

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278
CC Docket No. 92-90

**REPLY TO THE COMMENTS OF THE BROADCAST TEAM, INC.
BY MARC B. HERSHOVITZ, MICHAEL JABLONSKI, NED BLUMENTHAL
AND C. RONALD ELLINGTON**

The Broadcast Team, Inc. is a company that apparently specializes in placing prerecorded telemarketing calls for radio and television stations. The Broadcast Team boasts that it has the capability of placing more than one million prerecorded telemarketing calls per day.¹ In its comments filed in this proceeding on December 6, 2002, the company admits to placing *millions* of prerecorded advertisements on people's answering machines on behalf of radio and television stations.

The Broadcast Team now comes before this Commission arguing that their "good faith" interpretation of the Telephone Consumer Protection Act² permits prerecorded message calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity. This is not the case. Such calls are prohibited by the TCPA.³

¹ See <http://www.realcallworks.com>.

² 47 U.S.C. § 227 (hereinafter "TCPA").

³ See Mark Leibovich, A Familiar Voice on the Phone: Telemarketers Using Pitches by Dick Clark, Other Celebrities, Washington Post, Jan. 13, 1999, A01 (a copy is attached hereto as Exhibit A) The one court to have addressed this very issue to date rejected the same arguments
(continued...)

In addition to making specious arguments about the law, The Broadcast Team urged this Commission to take certain actions to prevent state courts from certifying class actions in cases brought under the TCPA. This Commission did not seek comments regarding the effectiveness and propriety of class actions under the TCPA. Moreover, the TCPA does not authorize this Commission to undertake the specific actions requested by The Broadcast Team. More importantly, foreclosing individuals from prosecuting TCPA claims as class actions would severely handicap the effectiveness of the TCPA and, thereby, diminish individual privacy and embolden telemarketers to violate the law.

I. PRERECORDED TELEMARKETING CALLS INITIATED BY RADIO OR TELEVISION STATIONS THAT ENCOURAGE TELEPHONE SUBSCRIBERS TO TUNE IN AT A PARTICULAR TIME FOR A CHANCE TO WIN A PRIZE OR SOME SIMILAR OPPORTUNITY FALL SQUARELY WITHIN THE PROHIBITIONS OF THE TCPA BECAUSE THEY ARE MADE FOR A COMMERCIAL PURPOSE AND CONTAIN UNSOLICITED ADVERTISEMENTS.

The Broadcast Team argues that the type of calls here at issue are exempt from the TCPA's ban on prerecorded message calls to residences as "commercial calls that do not contain an unsolicited advertisement."⁴ This is silly. If further argues that the prerecorded telemarketing calls only offer an "indirect" benefit to the stations making them.⁵ This is sillier.

The calls at issue do not fall within the exemption to the TCPA's ban on prerecorded

³(...continued)
advanced by The Broadcast Team. See Garver v. Susquehanna Radio Corp., Order dated March 20, 2001, State Court Fulton County, Georgia, Civil Action No. 00-VS-002168-F (a copy is attached hereto as Exhibit B) (this case is currently before the Georgia Court of Appeals, oral arguments were held on September 18, 2002, and a decision is forthcoming).

⁴ See The Broadcast Team, Inc. Comments at p. 2. The Broadcast Team apparently concedes that these calls are made for a commercial purpose.

⁵ See The Broadcast Team, Inc. Comments at p. 1-2.

message calls to residences for calls that do not contain “unsolicited advertisements” because they advertise (1) the commercial availability of a service (the station’s broadcast service) and (2) the commercial availability of property (the prize, or the opportunity to win a prize, offered as a quid pro quo for tuning in).

The phrase “unsolicited advertisement” has been defined by Congress.⁶ It means “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”⁷ The Broadcast Team does not contend that their clients have prior express invitation or permission from anyone authorizing them to call with prerecorded telemarketing messages. Accordingly, the issue is whether these prerecorded telemarketing calls promote “the commercial availability or quality of any property, goods, or services.”⁸ They do.

The prerecorded telemarketing calls initiated by radio or television stations are usually sophisticated and slickly crafted to attract public attention to their broadcast services and highlight the quality of their programming.⁹ The calls target residential home answering machines.¹⁰ It is not uncommon for the telemarketing company executing the answering machine advertising campaign

⁶ See 47 U.S.C. § 227(a)(4).

⁷ Id.; see also, 47 C.F.R. § 64.1200(f)(5) (identical definition to that found in 47 U.S.C. § 227).

⁸ See 47 U.S.C. § 227(a)(4).

⁹ See Exhibit B attached hereto.

¹⁰ See Exhibit A attached hereto (chief executive of The Broadcast Team stating “we’re trying to hit answering machines”).

to have its machines hang up if a live person happens to answer the telephone call.¹¹ The prerecorded messages use the voices of the stations' on-air personalities or other celebrities to deliver their messages.¹² The scripts are designed to fool an unwary recipient into believing that the on-air personality or other celebrity actually placed a personal call to him or her at home.¹³

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity are designed to encourage those receiving the messages to make a choice in the radio or television broadcast service marketplace, a choice to listen to or watch a particular channel. That one does not necessarily have to pay cash to listen to or watch radio or television broadcast channels is immaterial.¹⁴ Listening to or watching one station is a choice not to listen to or watch competing stations. The choice to listen to or watch a particular station represents a choice among the competing broadcast services. The prerecorded telemarketing calls at issue promote the commercial availability of the stations' broadcast services by trying to influence these choices.

In addition to trying to influence choices amongst competing broadcast services, the telemarketing calls under consideration here unambiguously offer a chance to receive valuable

¹¹ Id. (chief executive of The Broadcast Team discussing that its machines can disconnect the call if someone answers when The Broadcast Team is trying to targeting answering machines with prerecorded advertisements).

¹² See Exhibits A and C.

¹³ See Exhibits A and C.

¹⁴ Radio and television stations charge advertisers rather than listeners or viewers. Advertising rates are set based on a station's audience, the number of individuals tuning in. A station's advertisers pay when the listening public listens or watches a particular channel. The listening or viewing public may not pay cash to listen to or watch radio or television broadcast channels, but the stations certainly do get compensated when the public tunes in. The stations get paid by their advertisers.

property for listening to or watching certain radio or television programming.

Radio and television stations exhort the commercial availability and quality of property (the prize, or the opportunity to win a prize), and *offer an explicit quid pro quo* to the call recipient: listen or watch at certain times for the opportunity to receive the property.

The property offered by the telemarketing radio and television stations is varied. Frequently it is money. At other times it is tickets to concerts or sporting events or airline frequent flyer miles. It may be intangible property at times, but it is property nonetheless. When an individual listens to or watches a radio or television broadcast for a chance to get the offered prize, the stations receive something of value – increased listener or viewership – in return for providing an opportunity to receive property. Quite simply, the radio and television stations exchange the prospect of receiving a prize for expanded listener or viewership.

The radio or television stations that initiate the telemarketing calls at issue do not give their “prizes” as gifts, acts of detached and disinterested generosity. They offer an exchange supported by consideration and mutuality of obligation. This consideration and mutuality of obligation may not be of the character necessary to make the transaction illegal as a lottery or other game of chance under various state and federal laws, but it is hornbook law that giving a chance to receive “prizes” in exchange for listening or watching is a transaction supported by consideration and mutuality of obligation.¹⁵ Whether tuning into radio or television stations at stated times is sufficient consideration for a contract depends only on whether it was the requested detriment to the promisee

¹⁵ See Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495 (1955).

induced by the promise.¹⁶ Applying the analysis of Lucky Calendar Co. to the telemarketing calls at issue here, tuning in at certain times to a radio or television broadcast is a detriment and inconvenience which enures to the benefit of the station, a classic form of consideration.¹⁷

Radio and television stations do significantly more than just invite the recipients of its prerecorded messages to listen to or watch a particular radio or television broadcast¹⁸ with the telemarketing calls under consideration here. They go a step further: holding out a chance to win valuable property to induce compliance. The stations' prerecorded messages propose a quid pro quo.

Prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity advertise the commercial availability of services (broadcast services) and property (the "prizes" given in exchange for listening or watching) and therefore are unsolicited advertisements prohibited by the TCPA.¹⁹

¹⁶ Id.

¹⁷ The New Jersey Supreme Court held in an opinion by Chief Justice Vanderbilt in Lucky Calendar Co. v. Cohen, 117 A.2d 487 (1955), that a grocery store "give-away" contest did constitute an illegal lottery under New Jersey law. The scheme in Lucky Calendar Co. required participants to visit an Acme Supermarket, and deposit a card on which their name and address was written. No purchase was necessary. The New Jersey Supreme Court held that the scheme was an illegal lottery, in part due to the consideration present, the detriment or inconvenience to the participant of visiting the supermarket which afforded a benefit to the store. Id. at 495.

¹⁸ Such calls would be prohibited by the TCPA and FCC regulation, too.

¹⁹ For a more detailed discussion regarding the fact that prerecorded telemarketing calls initiated by radio or television stations that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity contain unsolicited advertisements, please see the Comments of Marc B. Hershovitz, Michael Jablonski, Ned Blumenthal and C. Ronald Ellington filed before the FCC in CG Docket No. 02-278 on November 20, 2002, and the Reply to (continued...)

II. THE BROADCAST TEAM USES FLAWED LOGIC TO ASSERT THAT THE PUBLIC DOES NOT FIND PRERECORDED TELEMARKETING MESSAGES LEFT ON PEOPLE'S HOME ANSWERING MACHINES ON BEHALF OF RADIO AND TELEVISION STATIONS OBJECTIONABLE.

In its comments filed in this proceeding on December 6, 2002, The Broadcast Team admits to placing *millions* of prerecorded advertisements on people's answering machines on behalf of radio and television stations. The company claims that the public does not find prerecorded answering machine advertisements objectionable or annoying because it purportedly receives very few do-not-call requests. However, the number of do-not-call requests is not the barometer of the public's attitude towards the offensive practices of The Broadcast Team.

An answering machine cannot hang up on a recording and a recording cannot take a caller's name to put on a do-not-call list. The only complaints The Broadcast Team is registering are from individuals who take the extraordinary initiative to track down and call the telemarketer who is placing prerecorded advertisements on their answering machines.

The Broadcast Team and their clients use prerecorded answering machine ads, in part, to insulate themselves from having to feel the frustration of the called party or having to register do-not-call requests. After thwarting the public from registering their displeasure with these telemarketing tactics, The Broadcast Team then argues that because they receive few complaints that their conduct is therefore legal. The fallacy of this argument should be readily apparent and require no further debunking.

¹⁹(...continued)
the Comments of the National Association of Broadcasters by Marc B. Hershovitz, Michael Jablonski, Ned Blumenthal and C. Ronald Ellington filed before the FCC in CG Docket No. 02-278 on January 6, 2003.

III. CLASS ACTIONS MAY BE THE ONLY EFFECTIVE MEANS OF ACHIEVING INDIVIDUAL JUSTICE UNDER THE TCPA AND CONGRESS DID NOT GRANT THIS COMMISSION PERMISSION TO CREATE SEPARATE RULES OF CIVIL PROCEDURE TO BE IMPOSED ON STATES WHEN THEIR COURTS HEAR TCPA CASES.

The TCPA provides any citizen with a private cause of action against persons who violate the TCPA, providing a monetary remedy of \$500.00 per violation, which can be trebled upon a showing of a willful and knowing violation of the Act.²⁰ Some individuals have sought to vindicate their rights under the TCPA by prosecuting their claims as class actions.

Because of the difficulty of accurately ascertaining the monetary damages suffered when the TCPA is violated, Congress provided that the damages one could recover for TCPA violations would be the actual monetary loss or \$500.00, whichever is greater. The \$500.00 figure was designed to encourage individuals to prosecute cases against telemarketers who violate the TCPA to create a private enforcement mechanism, alleviating the need for Congress to create or enlarge a bureaucracy to enforce the TCPA.

The TCPA has encouraged some people to file individual lawsuits in states' small claims courts without the aid of an attorney. However, telemarketers have employed a phalanx of lawyers to fight individual lawsuits in small claims courts with what can only be described as "scorched earth litigation." The telemarketers' attorneys assert frivolous and meritless arguments to try and delay or deny justice. For example, they argue their calls were not made for a commercial purpose or that their calls did not contain an unsolicited advertisement, even though such is clearly not the case.

The aggressive litigation posture of the telemarketing industry has made the \$500.00

²⁰ 47 U.S.C. § 227 (b)(3).

liquidated damages a successful plaintiff stands to receive an insufficient incentive for individuals to prosecute their claims under the TCPA without the aid of an attorney.

Class actions may be the only effective means of achieving individual justice under the TCPA. The American legal system can be complex and costly to navigate. If one steals \$1,000,000.00 from one person or one dollar from 1,000,000 people, the same amount of money has still been stolen. Without the mechanism of a class action, it is nearly impossible for individuals who have been harmed in modest ways to vindicate their rights. As the United States Supreme Court has recognized, “‘The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.’”²¹ Class action lawsuits have long been recognized as an efficient way of resolving the problems of many persons who have a common interest or problem.

The Broadcast Team cries over the size of some of its clients’ potential liability (and perhaps its own liability) if TCPA claims are to allowed to be prosecuted as class actions. However, the scope of a TCPA defendant’s potential liability is set by the magnitude of its illegal conduct. The Arizona Court of Appeals considered class actions under the TCPA and stated that

“‘[r]uinous or annihilating’ damages should not [cause courts to deny certification of class actions] . . . in circumstances such as this, where the size of the class, and therefore, the potential class liability, is entirely within the control of the defendants. To deny the superiority of a class action because the size of the class made the damages annihilating, would serve to encourage violation of the statute on a grand

²¹ Amchem Products, Inc. v. Windsor, 521 U.S. 615, 617 (1997) (citation omitted).

rather than a small scale.”²²

There are clear standards and procedures for certifying class actions and each of the several states should be allowed to have TCPA claims prosecuted within their borders as class actions if the circumstances warrant. Only Congress can prohibit TCPA claims from being prosecuted as class actions, but it did not.²³ Congress assigned private causes of action under the TCPA to be heard in state courts. Congress did not grant this Commission permission to create separate rules of civil procedure to be imposed on states when their courts hear TCPA cases.

Conclusion

The FCC does not need to specifically address prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity with additional rules. These calls are prohibited by the TCPA and current regulation. They always have been. These calls by radio and television stations are illegal under the TCPA and current FCC regulation. There is no need to clarify that which is already clear.

[CONTINUED ON NEXT PAGE]

²² ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 50 P.3d 844, 850-51 (Ariz. Ct. App. 2002) (discussing class actions under TCPA).

²³ Califano v. Yamisaki, 442 U.S. 682, 699-700 (1979); ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 50 P.3d 844, 850-51 (Ariz. Ct. App. 2002) (discussing class actions under TCPA).

Respectfully submitted this 7th day of January, 2003.

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Exhibit A



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A Familiar Voice on the Phone

Telemarketers Using Pitches by Dick Clark, Other Celebrities

By Mark Leibovich

Washington Post Staff Writer

Wednesday, January 13, 1999; Page A01

Dick Clark, ever ubiquitous on TV and radio, has found a new medium: telephone answering machines.

"Hi, this is Dick Clark," the ageless host told thousands of Washingtonians earlier this week. "I'm sorry to reach you at home, but I just wanted to call your attention to a television special I produced."

Clark is the latest celebrity to join an emerging chorus of famous telemarketers. Before, telemarketers were anonymous, low-paid strangers. But in recent months, real-life celebrities -- or at least taped versions of them -- have been carpet-bombing the nation's answering machines. Bill Clinton urged targeted voters to support Democratic candidates in November's elections. Singer Michael Bolton urged fans to buy a new album. As the National Basketball Association lockout dragged on, Orlando Magic owner Richard DeVos urged season ticket holders to "be patient."

While such taped celebrity pitches have Federal Communications Commission enforcement officials on alert, a Florida company that specializes in them reports that they are wildly popular -- especially compared with traditional telemarketing tactics. "Recipients love these things," said Rob Tuttle, chief executive of the Broadcast Team, a small Ormond Beach, Fla., firm that specializes in phone campaigns. It was Tuttle's firm that made the familiar voice of Dick Clark a little more so earlier this week -- and the Washington area was a target market for this telephonic assault.

Clark was promoting Monday night's American Music Awards. He told prospective viewers that the show would be on Channel 7 at 8 o'clock. He spoke in the relaxed manner of an old friend.

But some local targets were not amused. "People found the phone calls quite annoying," said Chris Pike, general manager of WJLA (Channel 7) in Washington, who said the station received a flurry of calls from angry viewers over the weekend.

Pike said that Channel 7 had nothing to do with the calls, and that they were commissioned by Dick Clark Productions, the Burbank, Calif., studio that produced Monday night's American Music Awards. Studio spokesman Logan Carr confirmed that it was Clark's voice on the messages and that calls were placed to selected U.S. markets.

Dick Clark Productions received about a dozen calls and electronic-mail messages from pitch recipients Monday, Carr said. The calls came less in anger than in confusion. "One guy was worried that his mother had gone over the bend because she was insisting Dick Clark called her," he said.

Clark himself was unavailable for comment yesterday, Carr said, because "he's busy doing cartoon voice-overs."

Tuttle said the phone calls are geared to answering machines rather than live people; most are placed during the day, when targets are presumed to be at work. If someone answers, the client (i.e., Dick Clark Productions) can automatically request that the call disconnect immediately.

"We're trying to hit answering machines," said Tuttle, who said his company has the capacity to complete more than 1 million calls a day. He won't divulge how many calls his company made in the Dick Clark campaign, or to what markets they were placed -- although Carr said Dick Clark Productions received reaction calls only from the Detroit and Washington areas.

Clients pay the Broadcast Team 25 to 75 cents per call, Tuttle said, depending on the length of the message left. It's cheaper, he said, for a company to leave messages than to send the same amount of direct mail. He said campaigns geared to answering machines generate far fewer complaints than calls that reach people in person. "When people get their messages, there's a perception that they missed the call from a friend," Tuttle said. Celebrities are coached during taping sessions on how to sound folksy and familiar. But most of them are used to public speaking, Tuttle said, so it generally comes easy.

"The voice sounds incredibly real and unscripted," said Steve Swetoha, director of ticket sales for the Orlando Magic, speaking of DeVos's message to 5,500 season ticket holders during the NBA lockout.

"Rich DeVos here," the Magic owner says matter-of-factly. "I'm sorry that we're using a tape recording for this, but we're trying to call all of our season ticket holders."

Swetoha said he is aware of no complaints from the ticket holders, although a few called to say, "Rich DeVos just called me -- what's going on?" "The team is contemplating similar promotions involving

Magic players, he said.

Entertainment businesses are turning increasingly to direct-marketing techniques to reach potential clients, said Chet Dalzell, spokesman for the Direct Marketing Association in New York. The trend raises dicey legal questions, especially since the 1991 passage of the Telephone Consumer Protection Act (TCPA), which placed restrictions on direct marketing.

While the TCPA limits the ability to complete a sale through an unsolicited phone call, there are broadly interpreted exceptions -- and the Broadcast Team has a team of lawyers steeped in the law and its subtleties, Tuttle said. For instance, while the law says a business cannot complete a sale to an unwilling customer over the phone, Tuttle points out that Dick Clark was not actually "completing a sale" but rather, simply, telling someone to watch something at a certain time, "like a friend."

This is debatable, said Dorothy Attwood, chief of enforcement at the common carrier bureau of the Federal Communications Commission. "Our view is that there is an argument to be made that these are unsolicited calls that run afoul of the TCPA," Attwood said. She said the commission will be monitoring such direct marketing closely as it proliferates.

"It's certainly an incredible annoyance to get these messages," Attwood said.

Not so, Tuttle said: "If you got a call from someone like Dan Marino, wouldn't you love it?"

Dick Clark's taped message can be heard at www.washingtonpost.com and on PostHaste by calling 202-334-9000 and using category No. 2335.

Celebrity Calling . . .

Dick Clark is among the celebrities now leaving promotional recorded messages on home answering machines. Here is the transcript of a recent message from Clark pitching "The American Music Awards":

"Hi, this is Dick Clark. I'm sorry to reach you at home but I just wanted to call your attention to a television special I produced. It's called "The American Music Awards" and it's on ABC Channel 7 Monday night at 8 o'clock. It's really the biggest music party of the year. It's called "The American Music Awards," lots of celebrities and terrific performances. It's a huge star-studded live event and I hope you get a chance to watch. It's "The American Music Awards" on Channel 7 Monday night. I think you'll like it. Hey, I'm sorry to call

you at home but I just wanted to personally invite you to watch. For more information you can check out the Web site www.americanmusicawards.com. Thanks so much."

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Exhibit B

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

MATT GARVER and RYAN SCHNEIDER,	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION FILE
v.	:	NO.: 00-VS-002168-F
	:	
SUSQUEHANNA RADIO CORP.	:	
	:	
Defendant.	:	

**ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT AS TO PLAINTIFF RYAN SCHNEIDER
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO
PLAINTIFF MATT GARVER**

This matter is before the Court on Defendant's Motion for Judgment on the Pleadings and a Motion To Stay Discovery. In addition, Plaintiffs filed a Motion for Partial Summary Judgment and Defendant filed a Cross Motion for Summary Judgment. The Court heard oral argument on October 24, 2000 and requested additional briefs from the parties addressing specific issues which were raised during the course of the hearing. The parties agree that there are no genuine issues of material fact and that this case presents a question of law. Upon consideration of all of the briefs, arguments, citation of authority, the Court enters the following order.

I. BACKGROUND

The Plaintiffs bring this action claiming that Defendant violated the Federal Telephone Consumer Protection Act, 47 U.S.C. §277(b)(1)(B) (hereinafter "TCPA")¹ as well as O.C.G.A. §46-5-23(a)(1) (hereinafter "ADAD"). Plaintiffs claim that the Defendant, Susquehanna Radio

¹For purposes of these motions, the parties have stipulated that under the holding of Hooters of Augusta, Inc. v. Nicholson 245 Ga. App. 363 (2000), reconsideration denied, that the TCPA authorizes a private cause of action in the state courts of Georgia.

Corporation, which owns and operates a local radio station known as 99X, violated the TCPA by delivering prerecorded messages to the Plaintiffs' personal residential phone lines and on their answering machines without the Plaintiffs' prior consent. Plaintiffs claim that they are entitled to statutory damages, punitive damages, and attorney's fees along with treble damages under the TCPA.

Defendant does not dispute that it delivered prerecorded messages to the Plaintiffs' phone lines, that the phone calls were generated interstate, or the content of the message. The speakers of the Defendants' messages are radio personalities (Jimmy Baron and Leslie Fram) who deliver the following messages:

Telemarketing Answering Machine Broadcast Number 1

"Hello. Hey, you there? Hello, pick up. Hey, it's Jimmy from 99-X calling. Yeah, I just wanted to know if I could borrow your car. Oh, I also needed to tell you about the 50,000 Delta Skymiles we're giving away on 99-X. Every Monday through Friday at 7, 11, 1, 3 and 5 - 50,000 Delta Skymiles. It ends this week. Look, if you need more information, just call (404) 287-1008 [ten oh eight]. So listen tomorrow morning at 7. And get back to me about your car."

Telemarketing Answering Machine Broadcast Number 2

"Hi. This is Leslie from the Morning-X on 99-X. I just wanted to make sure that you were included in Delta Destination II. Over the next 5 weeks, 99-X is giving away 7 million Delta Skymiles. I wanted to personally give you the times to listen each weekday to win. Starting at 7 AM on the Morning-X, and then at 11, 1, 3, and 5, you could win 50,000 Delta Skymiles. Here's the number to call for more information: (404) 266-0997. Good luck."

The Defendant claims that as a matter of law the delivery of such messages does not violate the TCPA for three reasons. First, Defendant contends that these calls are not made for commercial purposes. Second, Defendant contends that even if the calls are deemed to have been made for

commercial purposes, the message does not include the transmission of an unsolicited advertisement. Finally, with respect to Plaintiff Schneider, Defendant claims that it had an established business relationship with Plaintiff Schneider at the time the call was made so as to exempt this call from the prohibitions contained in the TCPA.

With respect to their claim under O.C.G.A. §46-5-23(a)(1), Plaintiffs have agreed that they will dismiss their claims under ADAD (counts 3 and 4 of the Complaint) upon the stipulation by Defendant that the calls were made interstate within the jurisdiction of the TCPA. Such stipulation was made at the hearing on October 24, 2000. Accordingly, this Court will not address such claims.

II. LEGAL AUTHORITY AND ANALYSIS

The TCPA is codified at 47 U.S.C. §227. In pertinent part, section (b)(1)(B) makes it “unlawful for any person within the United States... to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph 2(B).”

Paragraph 2(B) of the TCPA allows the Federal Communication Commission (hereinafter “FCC”) by rule or order to exempt from the previous prohibition calls which are not made for commercial purposes, classes or categories of calls made for commercial purposes which will not adversely affect the privacy rights intended to be protected under the Act, and calls which do not include the transmission of any unsolicited advertisement.

In accordance with Paragraph 2(B) of the statute, the FCC adopted exemptions to the general prohibition of initiating telephone calls to residential telephone lines using artificial or prerecorded

voices to deliver the message without the prior express consent of the called party. The following three exemptions are germane:

- (a) calls that are not made for a commercial purpose;
- (b) calls that are made for commercial purposes but do not include the transmission of any unsolicited advertisement; and
- (c) calls to any person with whom the caller has an established business relationship at the time the call is made.

See 47 CFR §64.1200(c)(1)-(3).

Thus, the issue before this Court is whether as a matter of law the telephone calls which were made to these Plaintiffs by Defendant are subject to the prohibition in the TCPA or whether they fall within any of the three above listed exemptions contained in the rules adopted by the FCC.

A. Non-commercial Purpose Exemption

As indicated above, the FCC has exempted from the prohibition of the TCPA any call that is not made for a “commercial purpose.” However, neither the TCPA nor the Code of Federal Regulations defines the term “commercial purpose.” Moreover, the parties have not cited any published court orders or opinions defining this term.

The Plaintiffs urge the Court to apply the plain and ordinary meaning of the words, citing Williams v. Taylor, 529 U.S. 420 (2000) and Ray M. Wright, Inc. v. Jones, 239 Ga. App. 521 (1991). Plaintiffs urge that the plain meaning of the term is readily ascertainable and that the term commercial means “something that is trying to realize a profit” and that the definition of purpose is an “aim or an objective.”

Defendant urges the Court to look at the FCC's pronouncement in the orders adopting this exemption. Defendant argues that because the TCPA expressly provided exemptions which were made by the FCC by way of rule or order, this Court should look not only to the specific provisions of the Code of Federal Regulations but also to the Report and Order of the FCC adopted September 17, 1992 regarding rules and regulations implementing the TCPA (hereinafter "Report and Order"). Under the authority of Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000) the Court will consider the Report and Order to ascertain whether it contains any directives or insight into the term "commercial purpose."

It is important to note at the outset that the Report and Order does not specifically define the term "commercial purpose." However, there is a section of the Report and Order (Paragraph 40) concerning "non-commercial calls." Defendant argues that under the Report and Order, if a call does not involve solicitation, it is therefore a call for a non-commercial purpose and is exempt from the prohibition of the TCPA. However, neither a reading of the Report and Order nor a reading of the specific exemptions contained in 47 CFR §64.1200 supports such a narrow definition of the term commercial purpose.

The Report and Order states that "the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities." 7 F.C.C.R. at 8773. It goes on to state that "we conclude that tax exempt non-profit organizations should be exempt from the prohibition on pre-recorded messages to residence(s) as noncommercial calls." Id. At 8774. Such exemption for tax exempt non-profit organizations is also set forth in the Code of Federal Regulations. 47 C.F.R. §64.1200(c)(4). In addition, the Report and Order finds that an "exemption for non-commercial calls would include calls conducting research, market surveys, political polling or similar activities

which do not involve solicitation as defined by the rules.” 7 F.C.C.R. at 8774 (emphasis added). In adopting these rules, the FCC rejected a proposal to create specific exemptions for each one of these activities but instead concluded that the general non-commercial purpose exemption was broad enough to cover these activities.

It is apparent that in the Report and Order the FCC was merely suggesting that specific exemptions from the telemarketing ban for market surveys, political polling calls, conducting research, or similar activities which do not involve solicitation as defined by FCC rules were not necessary. The FCC did not suggest that the defining element of all non-commercial calls is the absence of solicitation nor did it state positively that in order for a call to be made for a commercial purpose, necessarily it must involve solicitation.² In fact, the Court can conceive of a number of types of commercial calls that do not contain solicitation, i.e., calls from a company confirming appointments for repairs or service; or calls to inform the customer that an ordered item has arrived and is available for pick up.

Therefore, in accordance with long standing principles of judicial statutory construction, the Court will give plain meaning to the term “commercial purpose.” Commercial is generally defined as relating to or engaged in commerce, designed for profits, supported by advertising. (See Webster’s II New Riverside Dictionary.) Under this definition, the Court finds that the message in the calls was in fact designed for the admitted purpose to increase listeners to the radio broadcast and advertise the radio station in the stream of commerce for the legitimate purpose of increasing or maintaining revenue by increasing advertising sponsors. In fact, Defendant states in its post hearing

² The Defendant would define solicitation as used in this provision in accordance with 47 U.S.C. §227 (a)(3) and this Court will apply that definition.

supplemental brief that it “indisputably possessed an ‘economic motivation’ for making the calls complained of in this lawsuit. Like companies conducting research, Defendant hoped that these calls would further its ability to market its product-e.g., commercial advertising time-more profitably to customers.” Therefore, the Court finds that the calls at issue in this case were made for a commercial purpose.

**B. Calls Made for a Commercial Purpose That Do Not Include
The Transmission of Any Unsolicited Advertisement**

Having ruled that the Defendant’s calls were made for a commercial purpose, the next inquiry is whether or not the calls include the transmission of any unsolicited advertisement, since calls for commercial purposes are exempt if they do not contain unsolicited advertisements. Fortunately, the term “unsolicited advertisement” has been defined in the statute. It means “any material advertising the commercial availability or quality of any property, goods, or services, which is transmitted to any person without that person’s prior express invitation or permission.” 42 U.S.C. §227(a)(4). In this case, the Defendant argues that even if the calls were deemed to be commercial, they do not contain an advertisement of the commercial availability or quality of any property, goods or services in that the radio broadcasts referred to in the calls are not property, goods or services. Defendant contends that radio broadcasts are not services, but rather speech so that advertising broadcasts are not advertising a service. However, there is no dispute that the messages advertise the availability of Delta Skymiles which will be given away to listeners on the air at specified times and in fact both messages gave the times to “listen each weekday” to win.

Under the above stated exemption, the telephone message need only advertise goods or services that are commercially available. There is no question that broadcast air time is something

that can be purchased on Defendant's radio stations to advertise goods or services (albeit not by the message recipients). More importantly, in this case, the Court finds that Defendant's own actions show that its radio broadcast is a service. On June 5, 2000, Defendant filed an application with United States Patent & Trademark Office to register the servicemark 99X and in connection with the application identified the goods and services as being radio broadcast services.³ The messages clearly advertise the availability of broadcasts at certain times. Moreover, even if the message is not deemed to advertise the availability of a service, i.e., the radio broadcast, there is no question that Defendant's telemarketing calls promoted the commercial availability of goods and/or property by advertising the availability of Delta Skymiles. Therefore, the Court finds that the calls transmitted contained unsolicited advertisements as that term is defined in 42 U.S.C. §227(a)(4).

C. Persons with Whom the Caller Has an Established Business Relationship

Finally, Defendant argues that even if the calls were made for a commercial purpose and even if they included the transmission of an unsolicited advertisement, the calls are not prohibited to persons with whom the caller has an established business relationship. Defendant contends that Plaintiff Ryan Schneider has an established business relationship by virtue of his participation in the Freeloader Program offered by 99X. In the Freeloader Program, a person can participate in the program and receive discounts on concert tickets, t-shirts and other benefits of being a subscriber to that program. Defendant submitted the affidavit of its General Manager, Mark Renier, who

³ Plaintiff submitted evidence of this application in its supplemental brief. Defendant has not objected to the evidence, so the Court has considered it.

described the Freeloader Program. Membership applications are available at 99X sponsored events and various Atlanta locations. Application forms may also be completed at the station's website, 99X.com. The applicant must provide his name, address, phone number, email address and other personal information. 99X then sends a membership card to the applicant.

Attached as Exhibit B to Mr. Renier's affidavit is Ryan Schneider's membership application, dated October 16, 1996. He updated his information on September 4, 1998. He expressly granted permission to be contacted by 99X and has not requested that he be removed from the program. 99X regularly contacts Freeloaders, currently about 235,000, with information about 99X-sponsored events, contests and discount offers. The contacts are made by phone, mail, email, newsletters and a magazine. A member may be removed from the program by submitting a written request. The Report and Order states:

[T]he rules define the "established business relationship" as a prior or existing relationship formed by a voluntary two-way communication between the caller and the called party, which relationship has not been previously terminated by either party. The relationship may be formed with or without an exchange of consideration on the basis of an inquiry, application, purchase or transaction by the residential telephone subscriber regarding products or services offered by the telemarketer. A broad definition of the business relationship can encompass a wide variety of business relationships without eliminating legitimate relationships not specifically mentioned in the record.

7 F.C.C.R. at 8771 (footnote omitted). Plaintiffs argue that this exemption is inapplicable since Mr. Schneider did not give 99X his home phone number when signing up for the Freeloader Program and because there is no nexus between the Freeloader Program and the call at issue in this case.

However, the exemption does not require such a nexus, nor does only providing a business phone number in the prior established business relationship make the exemption inapplicable.

In addition, the privacy interest of Mr. Schneider is diminished in this case where he entered into a business relationship with the Defendant. The Court finds that the enrollment in the Freeloader Program is an established business relationship between Plaintiff Ryan Schneider and the Defendant, so that, the calls made to him by the Defendant are exempt from the prohibitions of the TCPA. Defendant has not established that Plaintiff Matt Garver is a member of the Freeloader Program, and, therefore, the calls made to him come under the prohibitions of the TCPA.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion for Summary Judgment as it relates to the claim brought by Plaintiff Ryan Schneider and **DENIES** the Defendant's Motion for Summary Judgment on the claims brought by Plaintiff Matt Garver. Defendant's Motion for Judgment on the Pleadings and Motion to Stay Discovery are **DENIED**. Plaintiffs' Motion for Partial Summary Judgment is **DENIED IN PART AND GRANTED IN PART** consistent with the terms of this Order.

SO ORDERED, this 20th day of March, 2001.

FILED IN OFFICE THIS DATE
20th Day of March 2001
Jal Ediff
Deputy Clerk, State Court
Fulton County, Georgia

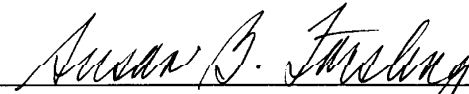

Susan B. Forsling
Judge, State Court of Fulton County

Exhibit C

Exhibit C

Transcripts of prerecorded telemarketing messages actually used by radio stations.

WBTS-FM

“Hey, what’s up? This is Britney Spears, Yeah, it’s me. And now there’s a brand new radio station in Atlanta that plays my music and all the best music—it’s the new 95point5 The Beat. That new radio station everyone is talking about. Tune in 95.5 right now and tell your friends...Oh! And if you want to win ten thousand dollars, The Beat is giving it away, just listen for two songs back to back from me, Britney Spears, and be the 95th caller at 404-741-095point5 and you’ll win from the new 95point5 The Beat Atlanta’s new number one hit music station.”

WNNX-FM

Hello. Hey, you there? Hello, pick up. Hey, it’s Jimmy from 99-X calling. Yeah, I just wanted to know if I could borrow your car. Oh, I also needed to tell you about the 50,000 Delta SkyMiles we’re giving away on 99-X. Every Monday through Friday at 7, 11, 1, 3, and 5 – 50,000 Delta SkyMiles. It ends this week. Look, if you need more information, just call (404) 287-1008 [ten oh eight]. So listen tomorrow morning at 7. And get back to me about your car.

WNNX-FM

Hi. This is Leslie from the Morning-X on 99-X. I just wanted to make sure that you were included in Delta Destination II. Over the next 5 weeks, 99-X is giving away 7 million Delta SkyMiles. I wanted to personally give you the times to listen each weekday to win. Starting at 7 A-M on the Morning-X, and then at 11, 1, 3, and 5, you could win 50,000 Delta SkyMiles. Here’s the number to call for more information: (404) 266-0997. Good luck.

(continued...)

WSB-FM

- VOICE 1: Hey it's Kelly and Alfa, the new morning guys at B98.5FM! Yeah, wish we could have got ya in person.
- VOICE 2: Yeah, because we want you to get your share of the cash we're giving away with the big money \$10,000 workday payday!
- VOICE 1: One thousand dollars every hour from 8 a.m. to 6 p.m. tomorrow!
- VOICE 2: Yeah, so set your radio to 98.5 FM, that's B98.5 FM. Wake up with us then listen for your chance to win a thousand dollars!
- VOICE 1: We'd really love for you to win, so here's the phone number...it's 404-741-0985.
- VOICE 2: Oh, and don't forget to try our 9 a.m. all music hour!
- VOICE 1: A full hour of music to start your workday with B98.5 FM!